IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No.

ETHEL KRESBERG,

Petitioner,

—against—

INTERNATIONAL PAPER COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below.

A statement as to the opinions below appears in the petition, at page 5.

Jurisdiction.

A statement as to jurisdiction appears in the petition, at pages 4-5.

The Facts.

A statement of the facts appears in the petition, at pages 1-4.

ARGUMENT

I.

The holding of the Circuit Court of Appeals that a quasi corporation does not come within the term "any corporation", in Section 24(1) of the Judicial Code, is in judicial conflict with the decisions of the Circuit Courts of Appeals, Eighth Circuit, in *Scott County, Arkansas* v. *Advance-Rumley Thresher Co.*, 288 Fed. 739, and Sixth Circuit, in *Bloomfield Village Drain District* v. *Keefe*, 119 F. (2nd) 157.

The Circuit Court of Appeals (Appendix, p. 19), as well as the District Court (R. 110), held that Hydro is a quasi corporation. The Circuit Court of Appeals (Appendix, p. 18) recognized that Hydro possesses nearly all of the rights, powers, attributes and characteristics of a chartered corporation. These are set forth in its opinion (Appendix, p. 18) and in the factual statement herein, and include the fact that Hydro "may sue and be sued in its own name and its property is subject to attachment and execution."

The Circuit Court of Appeals also took cognizance (Appendix, p. 19) of the fact that judicial authorities support petitioner's position that Hydro is to be generally considered a corporation.

Moreover, it held (Appendix, p. 20) that there was much force in the argument that since Hydro issued its securities, including its debentures, in the same way as a chartered corporation, and since such securities are widely purchased and sold in the public markets, Hydro should be held to be a corporation in suits on such securities.

Despite the foregoing, the Circuit Court of Appeals held (Appendix, p. 20) that in giving effect to the rule that federal jurisdiction is not to be extended beyond the scope

permitted by a strict construction of the statute upon which it rests, the term "any corporation" as provided in Section 24 (1) of the Judicial Code, does not encompass a quasi corporation. This argument was the sole ground advanced by the Circuit Court of Appeals in support of its conclusion.

The holding of the Second Circuit is in conflict with the decisions of the Eighth Circuit and the Sixth Circuit, *supra*.

In the Eighth Circuit case, *supra*, the Court held that a county, although not a chartered corporation, could, nevertheless, be regarded as a public corporation *or* a quasi corporation and on *either* basis was a "corporation" within the purview of Section 24 (1) of the Judicial Code.

The body before the court in the Sixth Circuit case, *supra*, was a Michigan drain district which, like a county, was not chartered. Moreover, it was not denominated a corporation in the state constitution or statutes. The rationale of the court was that since the entity had the essential characteristics of a corporation, it came within the term "any corporation" in Section 24 (1) of the Judicial Code.

The Second Circuit refused to admit that the foregoing decisions of the Sixth and Eighth Circuits were in conflict with its decision, but instead, sought to reconcile them by treating the entities in those cases as "public corporations". It wholly ignored the fact that while those entities happened to perform public functions, they were not chartered corporations, but quasi corporations possessing the essential characteristics of a corporation.

The decisions of the Eighth and Sixth Circuits clearly indicate that the entities therein were not held to be encompassed within the term "any corporation" merely because they performed public functions. More accurately speaking, both of such entities were public quasi corporations, as distinguished from a public chartered body such as a municipal corporation. This distinction was recognized by the Eighth

and Sixth Circuits and is commented upon with particularity at page 161 of the opinion of the Sixth Circuit.

There was never any doubt that a private chartered corporation was encompassed by the term "any corporation". The dispute first arose as to whether a public chartered corporation, such as a municipality, was also included within the purport of said term. This was resolved in the affirmative by this Court in *Loeb* v. *Trustees of Columbia Tp.,* 179 U. S. 472, 21 S. Ct. 174, 45 L. Ed. 280.

It is clear that the decisions of the Eighth and Sixth Circuits, *supra,* served to extend the principle of the *Loeb* case, *supra,* to non-chartered entities which were, nevertheless held to be "corporations" because they exhibited the essential characteristics of such a body and accordingly could be regarded as quasi corporations.

If the irreconcilable holding of the Second Circuit is permitted to stand, the following anomalous situation would exist: both a chartered and a quasi corporation which perform public functions would come within the term "any corporation"; whereas, although a chartered corporation which performs private functions would fall within said term, a quasi corporation which performs like functions would not.

It is, therefore, essential, that this Court determine the question involved herein and, particularly, whether the criteria laid down by the Eighth and Sixth Circuits and ignored by the Second Circuit, should be the true test to be applied in determining whether a body, exercising public or private functions, is encompassed within the term "any corporation".

In the light of the decisions of the Eighth and Sixth Circuits, *supra,* as well as the decision of this Court in the *Loeb* case, *supra,* it must be perceived that proper application of the principle of strict construction in this case did

not require a result which is contrary to the intention of Congress. Such legislative intent is indicated by its use of the words "any corporation", instead of the words "a corporation", obviously because the former has a wider and more comprehensive scope. The word "any" is defined in Webster's Universal Unabridged Dictionary as "one of three or more, which one not specified".

The amendment to the Judiciary Act of 1887 which put the words "any corporation" into the statute for the first time, was enacted subsequent to the decision of this Court in *Liverpool and London Life Insurance Company* v. *Oliver,* 10 Wall. 566, 19 L. Ed. 1029, affirming 100 Mass. 531, wherein it was held that a voluntary business association operating in the State of Massachusetts, a jurisdiction foreign to the one in which it was created, could be taxed as a corporation in that state. So holding, this Court said at page 1033:

> "We have no hesitancy in holding that, as the law of corporations is understood in this country, the Association is a Corporation * * *"

It is reasonable to assume that Congress was cognizant of the aforesaid ruling of this Court when it used the broad term "any corporation", intending thereby to encompass non-chartered entities which should be regarded as corporations.

The Second Circuit attempts to explain away the holding of this Court in the *Liverpool* case, *supra,* by saying that the language was directed to the issue presented and decided in that case. While we do not quarrel with this statement, it is no answer to petitioner's contention that Congress used the broad term "any corporation" in the light of the previously existing judicial pronouncement of this Court.

The Second Circuit also sought to reinforce its decision by commenting (Appendix, p. 21) on the fact that in

other federal statutes the term "corporation" is expressly defined to include quasi corporate bodies. However, no significance can be placed on said fact, because all of the statutes referred to were enacted considerably after the amendment of the Judicial Code in 1887, which it must be remembered had no specific definition of the term "any corporation". Obviously, Congress intended to leave this broad term to judicial construction. Its failure to include a specific definition in subsequent amendments of the section undoubtedly stemmed from its satisfaction with the construction placed upon said term by the Circuit Courts, which encompassed quasi corporations, as well as chartered corporations, within said term. (See *Scott* case, *supra,* and *Bloomfield* case, *supra,* which were respectively decided before and after the last amendment of 1940.)

It is also to be noted that the Sixth Circuit in the *Bloomfield* case, *supra,* and the highest court in the State of Massachusetts in *State Street Trust Company* v. *Hall,* 311 Mass. 299, held that in determining whether a body constituted a corporation, no special significance could be attached to the fact that there was no specific definition of the term so as to include the body in question.

The Second Circuit seeks to shunt aside the *State Street* case, *supra,* and some of the other cases cited by the petitioner for the proposition that voluntary associations, such as Hydro, are to be considered as corporations, by stating that such cases are not decisive on the question of federal jurisdiction. The Second Circuit even fails to mention two of the cases cited by petitioner. The first was *Mulloney* v. *United States,* 79 Fed. (2nd) 566, in which the Circuit Court of Appeals, First Circuit, in affirming the District Court of Massachusetts, 8 Fed. Supp. 674, held that since a Massachusetts association or business trust, such as Hydro, had practically all of the attributes of a corporation, it was to be treated as a corporation for the purpose of determining

whether it was privileged from producing books and papers before the Grand Jury in a criminal action.

The second case ignored by the Second Circuit was *Byrne* v. *American Foreign Association,* 3 F. R. D. 1, where the District Court of Massachusetts held that since a Massachusetts association or business trust had practically all of the attributes of a corporation, it should be dealt with as such for the purpose of determining whether it was subject to service of process.

Moreover, the Second Circuit made only a passing comment with respect to the most recent decision of the highest court of the State of Massachusetts in the *State Street* case, *supra,* to the effect that a Massachusetts association or business trust is to be generally considered a corporation.

The Second Circuit fell into the error of giving absolutely no weight to any of the foregoing cases. This is contrary to the reasoning of this Court in the *Loeb* case, *supra,* and to that of the Eighth Circuit in the *Scott* case, *supra,* in which said courts gave due cognizance to the fact that the bodies in question were considered as corporations for general purposes, in their respective states of organization. Moreover, the Sixth Circuit in the *Bloomfield* case commented (at p. 161) on the fact that it lacked "the authoritative guidance of the State courts".

This Court, in the *Loeb* case, *supra,* also stressed (p. 486 of U. S.) the fact that under the laws of the state of its creation, the entity had authority to sue in its own name. Although the Second Circuit noted in its opinion (Appendix, p. 18) that Hydro "may sue and be sued in its own name and its property is subject to attachment and execution", it, unlike this Court, chose to place absolutely no significance on that fact.

There can be no doubt that the Second Circuit approached the problem before it in a manner which is the direct antithesis of the rationale of this Court in the *Loeb* case,

supra, adhered to by the Eighth and Sixth Circuits. Accordingly, it reached a result which it concedes (Appendix, p. 19) has strong policy argument against it.

By the amendment of 1887, Congress apparently intended that the federal courts should not be cluttered with a mass of suits arising out of instruments made by individuals, which are generally of a local character. On the other hand, Congress evidently deemed it wise that the federal courts continue to have jurisdiction over suits involving bonds, debentures, notes, etc. which are generally bought and sold by the public in the open market places throughout the nation.

Inasmuch as Hydro's debentures were issued and publicly traded in the same manner as those of a chartered corporation, no logical reason could have been or was advanced for making any distinction between them. In any event, the ruling of the Second Circuit is directly in conflict with the decisions of the Eighth and Sixth Circuits, which petitioner respectfully submits correctly construe Section 24 (1) in the light of the true intention of Congress.

II.

The decision of the Circuit Court of Appeals pertains to an important question as to the construction of a federal statute involving jurisdiction of the federal district courts, which question of federal law has not been, but should be, settled by this Court.

Questions involving the jurisdiction of the federal district courts are generally of vital interest to this Court. This Court indicated its concern as to the construction of the particular section involved herein when it granted certiorari in the *Loeb* case, *supra.* There, it held that a municipal corporation, a chartered body, came within the term "any corporation" in Section 24 (1) of the Judicial Code. In

Point I hereof, we have shown that the different Circuit Courts have not uniformly applied the general principles laid down by this Court in the *Loeb* case, *supra,* to quasi corporations which possess practically all of the attributes of a chartered entity.

The Circuit Court of Appeals, First Circuit, in *Malley* v. *Howard,* 281 Fed. 363, affirmed 265 U. S. 144, in treating with a Massachusetts business trust for tax purposes, said at page 370:

> "It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance * * * "

There can be no doubt that the question involved herein will arise with increasing frequency. This Court of last resort should finally resolve the conflict existing between the different circuits on this important question of federal law.

CONCLUSION.

The holding of the Circuit Court of Appeals herein is in conflict with the decisions of the Eighth and Sixth Circuits. Unless the errors in the instant holding be corrected by this Court, considerable confusion will continue to result regarding the construction of a federal statute involving the jurisdiction of the federal district courts. The important question of federal law involved herein has not been, but should be, definitely settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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